United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7160

United States Court of Appeals
FOR THE SECOND CIRCUIT

B

MUSIC RESEARCH, INC., and ADELPHI RECORDS, INC.,

Plaintiffs-Appellees-Appellants,

v.

VANGUARD RECORDING SOCIETY, INC.,

Defendant & Third Party Plaintiff-Appellant-Appellee,

v.

HERB GART, d/b/a HERB GART MANAGEMENT, INC.,

Third Party Defendant.

BRIEF FOR PLAINTIFFS-APPELLEES-APPELLANTS

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BRIEF OF MUSIC RESEARCH, INC. AND ADELPHI RECORDS, INC.
AS PLAINTIFFS - APPELLEES - APPELLANTS

The Issue Presented on Appeal

1. Did the District Court, at the close of the plaintiffs' case, properly dismiss the plaintiffs' claims sounding in unfair competition, tortious interference with contractual rights and unjust enrichment?

Statement of the Case

A. Prior Proceedings

This diversity action, commenced by two District of Columbia corporations, Music Research, Inc. (hereinafter, "Music Research") and Adelphi Records, Inc. (hereinafter, "Adelphi"), sought damages arising out of the defendant's wrongful use and appropriation of the plaintiffs' literary property. The amended complaint and the pre-trial order recited four causes of action against the defendant, Vanguard Recording Society, Inc. (hereinafter, "Vanguard"), a manufacturer and wholesaler of phonograph records, based upon common law fraud, tortious interference with contractual rights, unfair competition and unjust enrichment. Injunctive relief was also sought. The defendant filed a third party

complaint against an individual, Herb Gart, d/b/a Herb Gart Management (hereinafter, "Gart"), seeking indemnity for any recovery which the plaintiffs might obtain. On October 22 through 24, 1975, the action was tried before the United States District Court for the Southern District of New York and a jury, the Hon. Charles L. Brieant, Jr., presiding. On the morning of the last day of trial, Vanguard entered into a stipulation dismissing, with prejudice, its third party complaint against Gart (Tr. 362a - 363a).* At the close of the plaintiffs' case, Vanguard moved to dismiss the claims against it pursuant to Rule 50 of the Federal Rules of Civil Procedure (hereinafter, "F.R.C.P."). Judge Brieant granted the motion in part by dismissing those claims of Music Research sounding in unfair competition, unjust enrichment and tortious interference with contractual rights, and all of the claims of Adelphi (Tr. 404a - 408a). Judge Brieant also denied the plaintiffs' claims for equitable relief (Tr. 424a). Music Research's remaining cause of action based on common law fraud went

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*Throughout this brief, the Trial Transcript shall be designated by "Tr." The pages of the Trial Transcript correspond with the pages of the Joint Appendix (hereinafter, the "Appendix"), so that, e.g., page 362 of the Trial Transcript may be found at page 362a of the Joint Appendix.

to the jury on a charge to which defendant's trial counsel offered no objection (Tr. 476a). The jury returned a verdict in favor of Music Research in the amount of $275,000.00.

Vanguard appealed the judgment entered on the verdict after Judge Brieant denied its motion for judgment n.o.v. or a new trial pursuant to F.R.C.P. Rule 59, as well as its motion for a new trial by reason of newly discovered evidence pursuant to F.R.C.P. Rule 60. The judgment entered herein appears at p.572a of the Appendix. Judge Brieant's endorsement decisions denying Vanguard's Rule 59 and Rule 60 motions appear at pp.677a and 678a of the Appendix. Music Research thereafter filed its cross appeal and, by this brief, presents its argument that the District Court erred in dismissing the plaintiffs' claims sounding in unfair competition, unjust enrichment and tortious interference with contractual rights.

In the event this Court decides to affirm the judgment of the lower court, based on a jury verdict, the plaintiffs consent to dismissal of the cross appeal.

B. Facts

In or about March of 1963, an individual named Thomas Hoskins, an avid collector of old phonograph

records, set out to find a man named Mississippi John Hurt, a guitar playing folk singer who had recorded several 78 rpm records released in the late 1920's (Tr. 47a). Following a clue contained in one of Hurt's songs entitled "Avalon Is My Home Town", Hoskins found John Hurt, then 71 years old, living with his wife in "a little 3-room shack back off the main road about 2 miles" (Tr. 49a) in Avalon, Mississippi, a small rural community. Hoskins gave Hurt a guitar and, after listening to him play, asked whether Hurt would be interested in again making records and performing professionally (Tr. 53a, 56a). Hurt was interested and, in mid-March 1963 Hoskins and Hurt drove to Washington, D.C. where, on March 15, 1963, Hurt entered into a management agreement ("the Management Contract") (Trial Exhibit 1 at p.486a of the Appendix) with Music Research, a corporation formed largely on the impetus of Hurt's rediscovery. Hoskins was then, as he is now, an officer and shareholder of Music Research.

The Management Contract, which by its terms did not expire until 1973, provided, among other things, that Music Research "shall have the exclusive right to make recordings of Artist's music and performances during the term of this agreement or in Manager's [Music

Research's] discretion to contract with others for making recordings of Artist's music and performances on behalf of Artist" (Trial Exhibit 1, paragraph 13).

During the next two and one-half years, John Hurt, in addition to performing live before various audiences, recorded two albums for Music Research on the "Piedmont" record label, the recording label used by Music Research (Tr. 63a). These albums, entitled "Mississippi John Hurt, Folk Songs and Blues" (Trial Exhibit 2) and "Worried Blues" (Trial Exhibit 3),were published in 1963 and 1964 respectively. They are still being sold in retail record shops today (Tr. 61a - 62a, 64a). During this two and one-half year period, Music Research also arranged, pursuant to paragraphs 7 and 13 of the Management Contract, for Hurt to appear on the 1963 and 1964 Newport Folk Festival recordings published by the defendant, Vanguard (Trial Exhibits 5-A, 5-B, 6-A and 6-B). Indeed, Hurt's extraordinary popularity at that time induced Vanguard to feature him (and his characteristic bowler) on the cover of one of its Folk Festival albums (Trial Exhibit 6-A), and to reproduce his photograph on another (Trial Exhibit 5-A). In connection with its Folk Festival albums, Vanguard used Hurt's likeness and his music after receiving Music Research's

express written consent (Tr. 78a - 80a, Trial Exhibit 94 at p.548a of the Appendix).

From 1963 to 1965, Music Research also accumulated tape recordings of Hurt's music (Tr. 70a). These tape recordings, entered into evidence at trial as Exhibit 4 and referred to throughout the transcript as the "vault tapes," contain a total of 25 hours of dialogue and music, enough quality material for the production of five long-playing records (Tr. 263a). In the summer of 1965, these tapes, recorded in coffee houses and in recording studios (Tr. 70a), constituted -- together with the Management Contract -- the major corporate assets of Music Research.

Against this background, in or about the summer of 1965, Music Research, a relatively small company, sought wider exposure for John Hurt by attempting to arrange a recording contract between Music Research, John Hurt, and "a major company, a large major label" (Tr. 86a - 88a). At that time Music Research intended to permit a major recording company to release two John Hurt recordings with little or no consideration flowing to Music Research (but usual royalty payments flowing to Hurt) in order to create a wider consumer market for John Hurt recordings. Music Research intended to exploit profitably this wider market "two or three years" later through the production

and sale of record albums produced from the vault tapes (Tr. 88a). Herbert Gart, an experienced booking agent who occasionally booked performances for John Hurt, was asked to help in this effort (Tr. 384a). Gart, who was also eager to obtain wider exposure for John Hurt (exposure which in the future would yield higher booking fees for Gart), approached Hoskins in or about November of 1965 with the information that Vanguard, a company with which Gart had a continuing business relationship (Tr. 89a, 163a - 164a), might be interested in recording John Hurt (Tr. 380a - 381a). Hoskins agreed to consider Vanguard, so Gart arranged a preliminary meeting which he, Maynard Solomon (Vanguard's president), John Hurt and Thomas Hoskins attended (Tr. 89a). At that initial meeting, Hoskins told Maynard Solomon that Gart would handle the negotiations but that, in any event, Music Research would have to execute the contract as the holder of the exclusive recording rights to John Hurt and would only execute a contract limiting Vanguard to the production of "two and only two records" of John Hurt's music (Tr. 90a - 91a).

Limited by these conditions and instructions, Gart began to negotiate with Vanguard. These negotiations

took place with Maynard Solomon both in person and on the phone (Tr. 388a - 391a). They also included a final meeting between Hoskins and Gart where, in revising a draft of the proposed recording contract which Vanguard had written, Hoskins again insisted on "two and only two" records and told Gart to alter the draft to reflect that requirement (Tr. 94a, 127a - 128a).

After this final meeting between Hoskins and Gart, Vanguard scheduled a recording session at Vanguard's New York City studios to record John Hurt's music for use on the Vanguard recordings (Tr. 96a). Hoskins attended this recording session with the understanding that Vanguard had agreed to the contractual terms as discussed by Solomon, Gart and Hoskins (Tr. 90a, 127a). At this recording session Hoskins asked Maynard Solomon if Solomon had the proposed Vanguard recording contract with Music Research. Solomon answered, "No" but that he would send it to Hoskins (Tr. 96a). Thereafter, Hoskins persisted in his requests to Solomon for the written agreement which embodied Vanguard's right to publish two and only two records of Hurt's music. Hoskins telephoned Solomon's office "a number of times" with reference to the recording agreement and each time

was told that Solomon was either busy or not in. Solomon never returned Hoskins' calls (Tr. 98a - 99a). Hoskins also made similar requests to Solomon in person on two subsequent occasions. In April of 1966, Hoskins was told that Solomon, "surprised [that] the contracts hadn't been sent out", would see to it (Tr. 99a - 100a). In July of 1966 Hoskins directly asked Solomon whether he had signed Hurt to a contract. Solomon said, "[N]o" (Tr. 102a). These statements, which proved to be false, were made to conceal the fact that, on the date of the first recording session, Maynard Solomon possessed a written recording contract which he was supposed to be holding for Hoskins' signature -- a contract which, contrary to Hoskins' expectations, entitled Vanguard to record not "two and only two" Hurt records, but "a minimum of two" albums.

In August, 1966, Vanguard released its first John Hurt album entitled "Mississippi John Hurt Today" (Trial Exhibit 9). Several months later, on November 2, 1966, John Hurt died. A year after the first Vanguard release, in September of 1967, a second Vanguard album entitled "The Immortal Mississippi John Hurt" (Trial Exhibit 10) was released for sale. At this point in

time, Hoskins stopped asking Maynard Solomon for the written agreement which he had requested and which had been promised many times. And understandably so, for the defendant's interest in John Hurt had terminated with its release of the second album.

In the Spring of 1970, over three years later, the folk music market was at its peak (Tr. 273a). It was then that Hoskins decided to reap the benefits of Hurt's increasing popularity (partially attributable to Vanguard's first two releases) by producing Hurt records from music recorded on the vault tapes. Therefore, on April 8, 1970, Music Research entered into a contract (Trial Exhibit 11 at p. 489a of the Appendix) with the co-plaintiff, Adelphi, for Adelphi to join Music Research in the preparation and marketing of a two-record John Hurt Memorial Anthology album prepared from music recorded on the vault tapes.

Over the course of the next year, Music Research and Adelphi began to perform under their 1970 contract. Adelphi reviewed the vault tapes, made selections for the album, and incurred various expenses in connection with the joint endeavor (Tr. 246a - 249a, Trial Exhibits 41, 64A, 64B, 64D, 64E, 65 - 74, 76 - 78).

In April of 1971, virtually on the eve of the planned release date of the Memorial Anthology album,

Vanguard released a third John Hurt album, a two-record set entitled "The Best of Mississippi John Hurt" (Trial Exhibit 13). That album sold for $5.95, almost one-half of the proposed $9.95 price of the Memorial Anthology album (Tr. 252a). Despite the plaintiffs' immediate protest (Tr. 110a - 111a, Trial Exhibit 68 at p. 546a of the Appendix), Vanguard not only refused to take the unauthorized album off the market but, in February, 1972, released yet a fourth John Hurt album entitled "John Hurt: Last Sessions" (Trial Exhibit 14). The effect of these two albums (Trial Exhibits 13 and 14), was to preempt the consumer market for John Hurt recordings, thus frustrating the performance of the Music Research-Adelphi contract (Tr. 250a - 251a). The third and fourth Vanguard albums also drastically reduced the value of the vault tapes by using up the previously unissued material available for release (Tr. 264a - 265a).

In response to the plaintiffs' protest over Vanguard's release of its third album, Vanguard claimed a right to issue more than two records by producing a written recording agreement dated November 30, 1965 which, by its terms, entitled Vanguard to produce not "two and only two" records, but a "minimum of 2 LP"

records (Paragraph 2 of Trial Exhibits 57 and 58 at pp. 505a and 509a of the Appendix). Although the unexecuted draft of this written recording agreement contained signature lines for four parties -- Vanguard, John Hurt, Herb Gart and Thomas Hoskins (Trial Exhibit 56 at p. 503a of the Appendix) -- the two signed copies (Trial Exhibits 57 and 58 at pp. 507a and 511a of the Appendix) were executed by only three parties -- Vanguard, Hurt and Gart. In lieu of the fourth signature, Hoskins' signature line was physically clipped off the signature page. At trial, there was directly conflicting testimony concerning who actually clipped the contracts, Gart testifying that he sent the contracts to Solomon "for Solomon to get his [Hoskins'] signature" (Tr. 388a) while Solomon claiming that he got back clipped contracts from Gart in the mail (Tr. 350a). A fair implication from the jury's verdict, however, is that the jury considered the clipping of the signature line to be evidence of Solomon's fraudulent intent (Tr. 403a, 464a - 465a).

Vanguard also tried to defend itself by raising a statute of limitations defense. It claimed that Hoskins knew or should have known about the 1965 Vanguard-Hurt-Gart agreement prior to January 26, 1971, two years from

the date of commencement of the lawsuit. Hoskins, however, was unaware of the existence of the 1965 agreement until after Vanguard's release of the unauthorized third album in April of 1971 (Tr. 169a). The jury resolved the statute of limitations issue, twice charged by the District Court (Tr. 467a - 469a, 475a), in favor of Music Research.

Argument

The District Court, in dismissing three of the four causes of action placed great reliance on the authorization given to Gart by Hoskins (Tr. 406a - 407a). The District Court seemed to reason that these claims should be dismissed because Hoskins, who was said to have cloaked Gart with the apparent authority to negotiate the 1965 Contract, was not entitled to a recovery based upon Vanguard's release of phonograph records pursuant to that agreement. It is respectfully submitted that the District Court's conclusion was erroneous because the issue of Gart's authority was a question of fact for the jury to decide, not the Court.

POINT I

The Scope of Gart's Apparent Authority was an Issue of Fact for the Jury, Not the Court, to Decide.

It is axiomatic that a Rule 50 motion is properly granted only when, "without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict." 5A J.Moore Federal Practice, ¶50.02[1], p.2320 (2d ed. 1975); Brady v. Southern Railroad, 320 U.S. 476, 479-480 (1943); Baird v. New York Central R.R., 242 F.2d 383 (2d Cir. 1957). The function of the appellate court "is to examine the entire record to determine whether there were any jury questions." Stief v. J.A. Sexauer Mfg. Co., 380 F.2d 453, 455 (2d Cir. 1967), cert. denied, 389 U.S. 897 (1967), reh. denied, 389 U.S. 997 (1967); Bernardini v. Rederi A/B Saturnus, 512 F.2d 660, 662 (2d Cir. 1975). If the evidence is sufficient to raise a question of fact for the jury, then the moving party must prevail regardless of the weight or credibility of the evidence. Id.

There can be no doubt in the instant case that, at the very least, a triable issue of fact was raised as to the existence of Gart's apparent authority. The

Restatement of the Law of Agency defines apparent authority as follows:

> "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." Restatement (Second) of Agency §8 (1958) [emphasis supplied]

Comment c to Restatement Section 8 explains the relevant rule:

> "c. Belief by third person. Apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe the agent is authorized. Further, the third person must believe the agent to be authorized." * * * See also, Restatement, supra, §49, Comment b; 2A C.J.S., Agency, §166 (1955).

Hoskins testified that, in November of 1965 prior to the commencement of any negotiations with Vanguard, Maynard Solomon was expressly advised of the scope of Gart's authority. Hoskins testified at Tr. 90a - 91a:

> "Q Can you describe what happened in this meeting of November, 1975 [should read 'November, 1965'] at the offices of Vanguard?
> A It was just that Mr. Solomon wanted to meet Mr. Hurt and it was explained to Mr. Solomon that we wanted a deal for two and only two records and that we wanted a sizeable advance and that the contract would have to be signed between Vanguard and Music Research, Inc. but that Herb

> Gart would be handling the negotiations between the two parties. . . " (Tr. 90a).
>
> * * *
>
> "THE COURT: No, what was told? Just tell us the substance of what was said at that meeting about this matter.
>
> What did you say, what did Mr. Gart say about this matter?
>
> THE WITNESS: Well, it was explained to Mr. Solomon that Music Research had a contract with John Hurt.
>
> THE COURT: Who told him that?
>
> THE WITNESS: I did and probably Mr. Gart as well and that we explained to him that the contract would have to be between Vanguard Records and Music Research, Inc. because Music Research, Inc. had an exclusive contract with John Hurt.
>
> We explained to him the reasons that we wanted John to be on a major label and that we were willing to give up two records with the hopes that we would make money off of it later by virtue of their wider distribution, publicity, etc. . . " (Tr. 91a).

Indeed, Gart's testimony was corroborative of Hoskins' claim that Gart had only limited authority with respect to the negotiation of the Vanguard agreement (Tr. 386a - 387a). In light of this testimony the jury was entitled to find that Maynard Solomon (the third party) was well aware of the actual scope of Gart's (the agent's) authority. This knowledge on the part of Solomon precludes a finding that Gart had apparent authority to negotiate for more than two records. Ford v. Unity Hospital, 32 N.Y.2d 464, 472, 299 N.E.2d 659, 346 N.Y.S.2d 238 (1973); Ernst Iron Works v. Duralith

Corp., 270 N.Y. 165, 170, 200 N.E. 683 (1936). As §166 of the Restatement, supra, explains:

> "§166. Persons Having Notice of Limitations of Agent's Authority.
>
> A person with notice of a limitation of an agent's authority cannot subject the principal to liability upon a transaction with the agent if he should know that the agent is acting improperly."

Indeed, the jury's finding of scienter on the fraud claim is highly significant. It indicates that Solomon knew, at the time he executed the 1965 contract for Vanguard, that Gart was exceeding the authority Hoskins had granted to him. Solomon, who wanted more than two records out of the 1965 contract, knew that his only chance of achieving that result was to deceive Hoskins into believing that the deal was for only two records. When Solomon uttered the false representations to Hoskins at the first recording session, he knew that Hoskins was laboring under the misapprehension that Vanguard had a two (and only two) record deal. This knowledge on the part of Solomon was a necessary predicate to the jury's finding of scienter on the fraud claim.

Assuming Gart had no authority, apparent or otherwise, to bind Music Research to a contract involving the

release of more than two records, Vanguard's release of its third and fourth albums was wholly unauthorized. Since the third and fourth Vanguard albums were issued illicitly then the remaining causes of action pleaded by the plaintiffs should not have been dismissed.

POINT II

The District Court Erred in Dismissing the Plaintiffs' Cause of Action Sounding in Unfair Competition.

Vanguard's unauthorized releases of its third and fourth albums constituted acts of unfair competition against both Music Research and Adelphi. In Metropolitan Opera Assn.,Inc., et al. v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup.Ct. N.Y. Cty. 1950), aff'd, 279 App.Div. 632, 107 N.Y.S.2d 795 (1st Dept. 1951), a case strikingly similar to the case at bar, plaintiffs (the Metropolitan Opera ("the Met") and Columbia Records) alleged that the defendant unfairly competed by recording broadcasts of the Met's opera performances, pressing phonograph records which embodied those performances and releasing those records for sale. The Met had previously granted Columbia Records the exclusive right to record its performances. In holding the complaint sufficient

to allege a cause of action based upon unfair competition, the Metropolitan Opera court explained:

> "With the passage of those simple and halcyon days when the chief business malpractice was 'palming off' and with the development of more complex business relationships and, unfortunately, malpractices, many courts, including the courts of this state, extended the doctrine of unfair competition beyond the cases of 'palming off.' The extension resulted in the granting of relief in cases where there was no fraud on the public, but only a misappropriation for the commercial advantage of one person of a benefit or 'property right' belonging to another." [emphasis supplied] (199 Misc, 786, 793, 101 N.Y.S. 2d 483, 489).

In the instant case, plaintiffs proved that Vanguard's "Best of" and "Last Sessions" albums consisted wholly of John Hurt music recorded during the term of Music Research's exclusive recording contract with Hurt. The "Best of" album, stipulated to have been released in April, 1971 (Tr. 109a), consisted of music recorded live at a concert (Tr. 112a). The "Last Sessions" album, released in February, 1972 (Tr. 110a), consisted of materials left over from the 1966 Vanguard recording sessions (Tr. 112a). The music contained in both albums was recorded and released during the term of Music Research's Management

Contract which did not expire until March 14, 1973.* The right to exploit these performances commercially belonged not to Vanguard but to Music Research or any of its contractual transferees, as holders of the exclusive recording rights pursuant to the Music Research Management Contract. This right of commercial exploitation constituted a protectable property interest. International News Service v. Associated Press, 248 U.S. 215 (1918); Madison Square Garden Corp. v. Universal Pictures Co., Inc., 255 App.Div. 459, 7 N.Y.S.2d 845 (1st Dept. 1938); King v. Mister Maestro, Inc., et al., 224 F.Supp. 101 (S.D.N.Y. 1963); Rudolph Mayer Pictures, Inc. v. Pathe News, Inc., 235 App.Div. 774, 255 N.Y.S. 1016 (1st Dept. 1932); Metropolitan Opera, supra. On similar facts, see, Radio Corp. of America v. Premier Albums, Inc., 19 App.Div.2d 62, 240 N.Y.S.2d 995 (1st Dept. 1963). That property interest belonged not only to the performing artist, but also to Music Research, the contractual transferee of that interest. Ferris

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*Paragraph 15 of the Management Contract provides for an initial five year term automatically renewable for an additional five years in the event John Hurt earns over $500 during the first five years of the contract. The plaintiffs proved by Hurt's W-2 form for 1964 (Trial Exhibit 8) that this earnings minimum was exceeded.

v. Frohman, 223 U.S. 424 (1912); Uproar Co. v. National Broadcasting Co. 81 F.2d 373 (1st Cir. 1936), cert. denied, 298 U.S. 570 (1936); Metropolitan Opera, supra. Vanguard's exploitation of this property interest for its own commercial benefit denied to Music Research the benefit of its Management Contract with John Hurt and thereby unfairly competed with Music Research. Vanguard's wrongful exploitation of this property interest also denied to both plaintiffs the fruits of their 1970 agreement. Metropolitan Opera, supra. Further, the fact that Music Research and Vanguard may not be actual competitors is not fatal to the cause of action. Tiffany & Co. v. Tiffany Productions, Inc., 147 Misc. 679, 264 N.Y.S. 459 (Sup.Ct. N.Y. Cty. 1932), aff'd mem. 260 N.Y.S. 821 (1st Dept. 1932), aff'd mem. 262 N.Y. 482, 188 N.E. 30 (1932).

POINT III

The District Court Erred in Dismissing the Plaintiffs' Cause of Action Sounding in Tortious Interference with Contractual Rights.

Assuming the third and fourth Vanguard albums to be released without Music Research's authorization, Vanguard also tortiously interfered with two Music Research

contracts -- the Management Contract (Trial Exhibit 1) and the 1970 Adelphi-Music Research agreement (Trial Exhibit 11).

The four essential elements of a cause of action for inducing breach of contract are (i) the existence of a valid contract; (ii) the defendant's knowledge of that contract; (iii) the defendant's intentional procurement of its breach; and (iv) damages. Samuel A. Israel v. Wood Dolson Company, 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956). The third element above may also be fulfilled if the defendant, while not procuring an actual breach, intentionally interferes with the performance of the agreement, thus making such performance onerous or impossible. W. Prosser, Law of Torts, Interference with Contractual Relations §129 (4th ed. 1971); Williams & Co. v. Collins, Tuttle & Co., 6 App. Div.2d 302, 176 N.Y.S.2d 99 (1st Dept. 1958)(action lies for intentional interference of a contract which "would have" existed but for the interference).

Vanguard's release of its "Best of" and "Last Sessions" albums constituted an interference with the contractual rights of Music Research under its Management Contract. The plaintiffs proved that the Manage-

ment Contract was valid and subsisting on the dates Vanguard, with full knowledge that Music Research (and not Vanguard) possessed the exclusive right to release John Hurt recordings for sale, released its albums. The third and fourth Vanguard albums constituted the fruits of Vanguard's interference with Music Research's contractual relationship with Hurt. As such, a cognizable cause of action existed in favor of Music Research. Robe v. Sun Record Company, 242 F.2d 684, 688 (5th Cir. 1957). Indeed, Vanguard's acts of interference, in the form of attempts to "break" the Management Contract, continued through 1971, even after Music Research's demand that Vanguard cease production and sale of its third album. See, e.g., Trial Exhibit 86 at p. 534a of the Appendix.

Vanguard's release of the "Best of" and "Last Sessions" albums also constituted tortious interference with the contractual rights of Music Research and Adelphi under their 1970 agreement. Eugene Rosenthal, Adelphi's president, testified that Vanguard's release of the third and fourth albums made the Music Research-Adelphi contract impossible to perform (Tr. 250a - 251a). Indeed, Vanguard's release of a two-record set (the "Best of"

album) at literally half of Adelphi's proposed price, not only destroyed the market for John Hurt recordings, but caused the plaintiffs to abandon the project completely. Id. Solomon was advised of the existence of the 1970 agreement by letter from the plaintiffs' attorney in March of 1971 (Trial Exhibit 68 at p. 546a of the Appendix). The jury was entitled to find that Vanguard's continuing release and sale of its third album (and its deliberate release of its fourth album) in the face of the plaintiffs' demands, constituted a tortious interference. The plaintiffs were damaged by this interference by reason of their lost profits on the "John Hurt Memorial Anthology" album (Tr. 260a).

POINT IV

The District Court Erred in Dismissing the Plaintiffs' Cause of Action Sounding in Unjust Enrichment.

Since Vanguard's release of the "Best of" and "Last Sessions" albums was unauthorized by Music Research, Vanguard was also unjustly enriched at the plaintiffs' expense.

Recovery on a theory of unjust enrichment, or "restitution," may be had when one person obtains money from another under such circumstances that in equity and

good conscience he ought not retain it. Miller v. Schloss, 218 N.Y. 400, 407, 113 N.E. 337 (1916). In this respect restitution lies for money or property obtained by tortious conduct. 50 N.Y. Jur., Restitution and Implied Contracts §§21, 23 (1966). Vanguard was able to acquire the music from which it recorded its fourth album only by defrauding Music Research into permitting Vanguard to record John Hurt in 1966. Vanguard was able to acquire the music with which it produced its third album only by acquiring from a third party a tape recording of a live John Hurt concert at a time when only Music Research had the right to record and exploit Hurt's music commercially. Metropolitan Opera, supra. Thus, restitution would have been clearly appropriate.

Conclusion

For the aforesaid reasons, the plaintiffs respectfully pray that, in the event the judgment entered herein is not affirmed, the plaintiffs' cross appeal be granted and the plaintiffs be entitled to a jury trial on the

causes of action sounding in unfair competition, tortious interference with contractual rights and unjust enrichment.

Respectfully submitted,

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